AZLIN AZRAI LAN HAWARI v. UNITED OVERSEAS BANK (MALAYSIA) BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEALS NO: W-03(IM)(NCC)-20-02-2016, W-03(IM)(NCC)-19-2016 & W-03(IM)(NCC)-21-2016]
12 JULY 2017

CIVIL PROCEDURE: *Judgments and orders – Judgment debt – Judgment obtained by judgment creditor ('JC') against judgment debtor ('JD') not satisfied – JC commenced judgment debtor summons ('JDS') proceedings against JD – JD ordered to pay judgment debt in instalments – JD breached terms of order by failing to comply with monthly instalments – JC commenced bankruptcy proceedings against JD – Whether JC could commence bankruptcy proceedings as there was JDS in place – Whether there was modification/variation of original judgment – Whether JD breached JDS order – Whether original judgment nullified by JDS order – Debtors Act 1957, s. 3*

BANKRUPTCY: *Notice – Validity – Judgment obtained by judgment creditor ('JC') against judgment debtor ('JD') not satisfied – JC commenced judgment debtor summons ('JDS') proceedings against JD – JD ordered to pay judgment debt in instalments – JD breached terms of order by failing to comply with monthly instalments – JC commenced bankruptcy proceedings against JD – Whether JC could commence bankruptcy proceedings as there was JDS in place – Whether there was modification/variation of original judgment – Whether JD breached JDS order – Whether original judgment nullified by JDS order – Whether bankruptcy notice valid – Bankruptcy Act 1967, s. 3(1)*

The respondent/judgment creditor ('the JC') obtained a judgment against the appellant/judgment debtor ('the JD') for the sum of RM79,804,851.04 ('the judgment'). However, the judgment was not satisfied. The JC commenced judgment debtor summons ('the JDS') proceedings against the JD and in the proceedings, the Senior Assistant Registrar ordered the JD to pay (i) RM3,520,000 forthwith to the JC as partial satisfaction of the judgment ('term (i)'); (ii) RM5,000 per month until full and final settlement of the judgment ('term (ii)'); and (iii) RM4,000 as costs ('the JDS order'). The JDS order contained a default clause that in the event the JD failed to comply with the terms, enforcement proceedings might be taken against him. The JD appealed against the JDS order to the judge-in-chambers. The appeal was allowed in part and the judge had set aside term (i) of the JDS order while term (ii) of the same remained unchanged ('the JDS appeal order'). In compliance with the JDS appeal order, the JD paid to the JC (i) RM13,000 on 12 January 2015 being payment for costs and monthly instalment payment for one month starting from 13 November 2014; (ii) RM15,000 on

29 January 2015 being payment for three months starting from 13 December 2014; and (iii) RM15,000 on 31 March 2015 being payment for three months starting from 13 March 2015. According to the JC, the JD breached the terms of the JDS order by failing to comply with the monthly instalment due on 13 March 2015. This led the JC to file a bankruptcy notice ('BN') against the JD. The JD filed an application to set aside the BN but the application was dismissed. An attempt to appeal to the judge-in-chambers, too, proved futile as the judge held that, (i) the JD had initiated the wrong mode to challenge the BN; and (ii) although the JDS was already in place, the BN was valid. Hence, the present appeals. The issues that arose were (i) whether the JC could commence bankruptcy proceedings as the JDS was already in place against the JD; (ii) whether there was a modification/variation of the original judgment; (iii) whether the JD breached the JDS order; (iv) whether the original judgment was nullified by the JDS order; and (v) whether the BN was valid in light of the different amount claimed.

Held (dismissing appeals)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) The JC could proceed to issue the BN for bankruptcy proceedings as, under s. 3(1) of the Bankruptcy Act 1967 ('the BA'), it had obtained a final order against the JD for an amount and execution of it had not been stayed. JDS proceeding did not amount to a stay of execution of the judgment. Since execution was not prevented nor stayed with the issuance of the JDS order, the JC had met the requirements for the committal of an act of bankruptcy under s. 3(1)(i) of the BA. The JD had committed an act of bankruptcy. Therefore, the BN was valid and there were no merits in the application by the JD to set aside the BN. (paras 25, 34, 36 & 37)

(2) The JC was entitled to commence bankruptcy proceedings against the JD concurrently with the JDS order. Based on s. 3 of the Debtors Act 1957 ('the DA'), it was clear that the JDS was an execution proceeding. Hence the net result was that there was no modification or variation of the original judgment by virtue of the JDS order. Furthermore, s. 8 of the DA provides that an order of the payment of instalments of a judgment debt shall not be a bar to proceedings in execution. (paras 42, 43, 44 & 47)

(3) Bankruptcy proceedings can be commenced where there is a default in the instalment payments which is in breach of an order to pay by instalments. Based on evidence, the JD made payment after the BN was issued against him on 31 March 2015. The cheque for the instalment payment was received by the JC at 4.15pm after the BN was filed and could only be cashed in on 1 April 2015. Effectively, there had not been any payment made before the BN was filed. (paras 48 & 49)

(4) The original judgment was never set aside nor overturned on appeal and thus remained valid and enforceable. The JDS order, which allowed for instalments payments, did not nullify the original judgment. (para 51)

(5) The acceptance of payment by the JC did not nullify the BN as the outstanding amount due was over and above the statutory limit, as provided under s. 5(1) of the BA. The BN was not invalidated even if it failed to take into account the part payment, as long as the balance sum claimed was above the statutory limit set by the BN, as in the present appeals. The judgment sum was RM80 million and the payment received was RM5,000, leaving a balance far above the RM30,000 statutory limit. (para 60)

Bahasa Malaysia *Headnotes*

Responden/pemiutang penghakiman memperoleh penghakiman terhadap perayu/penghutang penghakiman bagi jumlah RM79,804,851.04 ('penghakiman'). Walau bagaimanapun, penghakiman ini tidak dilunaskan. Pemiutang penghakiman memulakan prosiding saman penghutang penghakiman ('SPP') terhadap penghutang penghakiman dan dalam prosiding tersebut, Penolong Kanan Pendaftar memerintahkan penghutang penghakiman membayar (i) RM3,520,000 kepada pemiutang penghakiman dengan kadar serta-merta untuk melunaskan sebahagian penghakiman ('terma (i)'); (ii) RM5,000 sebulan hingga penyelesaian penuh dan muktamad penghakiman ('terma (ii)'); dan (iii) kos sebanyak RM4,000 ('perintah SPP'). Perintah SPP ini mengandungi klausa keingkaran iaitu jika penghutang penghakiman gagal mematuhi terma-terma tersebut, prosiding pelaksanaan akan dimulakan terhadapnya. Penghutang penghakiman merayu pada hakim dalam kamar terhadap perintah SPP. Sebahagian rayuan dibenarkan dan hakim mengetepikan terma (i) perintah SPP manakala terma (ii) kekal tanpa diubah ('perintah rayuan SPP'). Mematuhi perintah rayuan SPP, penghutang penghakiman membayar kepada pemiutang penghakiman (i) RM13,000 pada 12 Januari 2015 iaitu bayaran kos dan bayaran ansuran bulanan bagi satu bulan bermula dari 13 November 2014; (ii) RM15,000 pada 29 Januari 2015 iaitu bayaran bagi tiga bulan bermula dari 13 Disember 2014; dan (iii) RM15,000 pada 31 Mac 2015 iaitu bayaran bagi tiga bulan bermula dari 13 Mac 2015. Menurut pemiutang penghakiman, penghutang penghakiman melanggar terma-terma perintah SPP kerana gagal mematuhi ansuran bulanan terhutang pada 13 Mac 2015. Ini mendorong pemiutang penghakiman memfailkan notis kebankrapan ('NK') terhadap penghutang penghakiman. Penghutang penghakiman memfailkan permohonan mengetepikan NK tetapi permohonan ini ditolak. Rayuan pada hakim dalam kamar juga tidak berjaya kerana hakim memutuskan (i) penghutang penghakiman menggunakan cara salah untuk mencabar NK; dan (ii) walaupun wujud SPP, NK kekal sah. Maka timbul rayuan-rayuan ini. Isu-isu yang timbul adalah (i) sama ada pemiutang kehakiman boleh memulakan prosiding kebankrapan kerana wujud SPP terhadap penghutang

penghakiman; (ii) sama ada terdapat penukaran/pengubahan pada penghakiman asal; dan (iii) sama ada penghutang penghakiman melanggar perintah SPP; (iv) sama ada penghakiman asal dibatalkan oleh perintah SPP; dan (v) sama ada NK sah kerana jumlah berlainan dituntut.

Diputuskan (menolak rayuan-rayuan)

Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) Pemiutang penghakiman boleh terus mengeluarkan NK bagi prosiding kebankrapan kerana, bawah s. 3(1) Akta Kebankrapan 1967 ('AK'), pemiutang penghakiman telah memperoleh perintah muktamad terhadap penghutang penghakiman bagi satu jumlah dan pelaksanaannya belum digantung. Prosiding SPP bukan penggantungan pelaksanaan penghakiman. Oleh kerana pelaksanaan tidak dihalang mahupun digantung dengan pengeluaran perintah SPP, pemiutang penghakiman memenuhi syarat-syarat bagi pengkomitan tindakan kebankrapan s. 3(1) AK. Penghutang penghakiman telah melakukan tindakan kebankrapan. Oleh itu, NK sah dan permohonan penghutang penghakiman untuk mengetepikan NK tidak bermerit.

(2) Penghutang penghakiman berhak memulakan prosiding kebankrapan terhadap pemiutang penghakiman serentak dengan perintah SPP. Berdasarkan s. 3 Akta Penghutang 1957 ('AP'), jelas bahawa SPP adalah prosiding pelaksanaan. Oleh itu keputusan keseluruhan adalah bahawa tiada penukaran atau pengubahan penghakiman asal melalui perintah JDS. Tambahan lagi, s. 8 AP memperuntukkan bahawa perintah bayaran ansuran hutang penghakiman bukan penghalang prosiding pelaksanaan.

(3) Prosiding kebankrapan boleh dimulakan jika berlaku keingkaran membayar ansuran iaitu pelanggaran perintah membayar secara ansuran. Berdasarkan keterangan, penghutang penghakiman membuat bayaran selepas NK dikeluarkan terhadapnya pada 31 Mac 2015. Cek bayaran ansuran diterima oleh pemiutang penghakiman pada 4.15 petang selepas NK difailkan dan hanya boleh ditunaikan pada 1 April 2015. Hakikatnya, tiada bayaran dibuat sebelum NK difailkan.

(4) Penghakiman asal tidak diketepikan atau diakas melalui rayuan dan kekal sah dan boleh dikuatkuasakan. Perintah SPP, yang membenarkan bayaran ansuran, tidak membatalkan penghakiman asal.

(5) Penerimaan bayaran oleh pemiutang kehakiman tidak membatalkan NK kerana jumlah tertunggak yang terhutang lebih dan melampaui had statutori, seperti yang diperuntukkan bawah s. 5(1) AK. Notis kebankrapan tidak terbatal jika pun gagal mengambil kira sebahagian bayaran, selagi baki jumlah dituntut melebihi had statutori yang ditetapkan oleh NK, seperti dalam rayuan-rayuan ini. Jumlah

penghakiman ialah RM80 juta dan bayaran yang diterima berjumlah RM5,000, meninggalkan baki yang jauh melebihi had statutori iaitu RM30,000.

Case(s) referred to:

Ahna Lana Velathan v. Vina Chinniah & Anor [1938] 1 LNS 8 HC ***(refd)***
Ahna Moona Muthuraman Chettiar v. KN Nair & Ors [1938] 1 LNS 9 HC ***(refd)***
Datuk Mohd Sari Datuk Hj Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd [1992] 4 CLJ 1798; [1992] 1 CLJ (Rep) 68 SC ***(refd)***
Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd [2015] 4 CLJ 561 FC ***(refd)***
J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(refd)***
Kuna Sockalingam Mudaliar v. Yang Saripah & Anor [1953] 1 LNS 39 HC ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
Montgomery & Co v. De Blumes [1898] 2 QB 420 ***(refd)***
Moscow Narodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241 FC ***(refd)***
Re Chen Sing Chew; Ex parte : Oriental Tin Smelters Sdn Bhd [1974] 1 LNS 131 HC ***(refd)***
Re HA Pereira, ex parte Pagor Singh (Bhagat Singh) [1932] 1 LNS 64 SC ***(refd)***
Re Sturdee (A Debtor) [1985] 2 NZLR 627 ***(refd)***
Re Watson Ex parte Johnston [1893] 1 QB 21 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), (2), 5(1)(a)
Bankruptcy Rules 1969, rr. 18, 95
Debtors Act 1957, ss. 3, 4(1), (6), (7), 6(2), 8
Rules of Court 2012, O. 42 r. 12

Insolvency Act 1967 [NZ], s. 19(1)(d)
Rules of the Supreme Court [Sing], O. 40 rr. 16, 30(3)

For the appellant - Bastian Pius Vendargon, Wong Rhen Yen, Hanif Idris, Mohamed Fadzil Abdul Rahman & Afdhilani Jusof; M/s Hanif Idris & Assocs
For the respondent - Ng Sai Yeang, Lim Siew Ming & Loh Kah Hey; M/s Raja Darryl & Loh

[Editor's note: Appeal from High Court, Kuala Lumpur; Bankruptcy No: 29NCC-1787-2015 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] The appellant/judgment debtor (JD) appealed against the decision of the learned High Court Judge dated 28 January 2016 which had affirmed the decision of the learned Senior Assistant Registrar's (SAR) decision dated 26 August 2015, in dismissing the JD's application to set aside the bankruptcy notice dated 31 March 2015 (BN) issued by the respondent/judgment creditor (JC).

[2] It is to be noted that there are two similar appeals premised on similar causes of action and issues relating thereto, ie, Appeals No: W-03(IM)(NCC)-19-2016 and W-03(IM)(NCC)-21-2016. Parties agreed that the decision of the present appeal would bind these other two appeals.

[3] After hearing the submissions from parties and perusing through the appeal records of the present appeal, we are of the unanimous view that there are no merits in the appeal and therefore dismissed the three appeals. Hereinbelow are our grounds.

Background

[4] On 11 August 2011, the JC had obtained final judgment against the JD for the sum of RM79,804,851.04 together with costs and interests. The final judgment was however, not satisfied.

[5] On 28 September 2011, the JC commenced judgment debtor summons (JDS) proceedings against the JD. In the JDS proceedings, the JC obtained an order against the JD on 13 November 2014, whereby the Senior Assistant Registrar (SAR) ordered the JD to pay:

(i) RM3,520,000 forthwith to the JC as partial satisfaction of the final judgment;

(ii) RM5,000 per month until full and final settlement of the judgment; and

(iii) RM4,000 as the costs,

with a default clause that, in the event the JD failed to comply with the terms of the JDS order, enforcement proceedings may be taken against the JD (hereinafter referred to as "the JDS order").

[6] The JD appealed against the JDS order to the judge in chambers.

[7] On 9 December 2014, in the appeal before the judge in chambers, the learned High Court Judge allowed the appeal in part with costs of RM4,000 and ordered that:

(i) the JDS order ordering the JD to pay the sum of RM3,520,000 forthwith to the JC is set aside;

(ii) the JDS order ordering the JD to pay the monthly instalment of RM5,000.00 until full settlement and costs of RM4,000 to the JC, remain unchanged.

(hereinafter referred to as "the JDS appeal order")

[8] In complying with the JDS appeal order, the JD made payments to the JC in the following manner:

(i) on 12 January 2015, the JD paid RM13,000 being payment for costs and monthly instalment payment for one month starting from 13 November 2014;

(ii) on 29 January 2015 the JD paid RM15,000 being the monthly instalment payment for three months starting from 13 December 2014; and

(iii) on 31 March 2015 the JD paid RM15,000 being the monthly instalment payment for three months starting from 13 March 2015.

[9] It was contended by the JC that the JD failed to comply with the monthly instalment due on 13 March 2015 thereby breaching the terms of the JDS order.

[10] As a result, on 31 March 2015, the JC filed a bankruptcy notice (BN) against the JD pursuant to the Bankruptcy Act 1967 and Bankruptcy Rules 1969.

[11] On 27 April 2015, the JD filed an application to set aside the BN *vide* summons in chambers (encl. 4) premised on the following grounds:

(i) the JC is estopped from commencing with bankruptcy proceedings on grounds that the JD had moved the court and obtained the JDS order in the JDS proceedings which orders the JD to pay a monthly instalment of RM5,000 to the JC until full and final settlement of the judgment;

(ii) the JD had and still, complies with the terms of the JDS order and JDS Appeal order by making monthly instalment payments;

(iii) the BN is void *ab initio* for non-compliance with the final judgment; and

(iv) the BN is void *ab initio* as the amount claimed is inaccurate and excessive.

[12] The application in encl. 4 was dismissed by the SAR on 26 August 2015.

[13] The JD appealed to the judge in chambers and it was dismissed by the learned judge on 28 January 2016. The basis of the dismissal by the learned judge in his grounds are namely:

(i) that the JD had initiated the wrong mode to challenge the bankruptcy notice. As the JD's challenge was premised on the sum claimed in the BN, the JD should have filed an affidavit under r. 95 of the Bankruptcy Rules 1969 and not *vide* summons in chambers under r. 18 of the same. (This constitutes preliminary issues raised by the JC in its written submission, however, since the appeal on the matter is already before us, we decided to hear the appeal on its merits rather than on preliminary points and/or procedural grounds.)

(ii) although the JDS was already in place, the BN is valid.

(iii) the JD had breached the JDS order when he failed to make monthly instalment payments as agreed pursuant to the JDS order.

(iv) the BN reflects the terms of the judgment which was obtained against the JD. The sum as in the BN is correct as at the date of the BN. The BN is thus valid.

JD's Contention

[14] We noted that the main ground of appeal relied on by learned counsel for the JD in the arguments before us are as follows.

[15] Firstly, it was contended that the learned judge had erred in allowing the JC to commence bankruptcy proceedings when the JDS is in place and which order the JD purportedly complied with.

[16] It was submitted that the JC is estopped from initiating the bankruptcy proceedings against the JD since the final judgment was modified by the JDS order and the parties are bound and subject to the terms of the JDS order.

[17] In support of this contention, the case of *Re HA Pereira, ex parte Pagor Singh (Bhagat Singh)* [1932] 1 LNS 64; [1932] MLJ 112 was referred to us wherein Mudie J had the occasion to consider whether the judgment was modified by the order for the payment by instalments and that whether a bankruptcy notice which was founded on the judgment as it originally stood was invalidated.

It was submitted by learned counsel for the JD that *Re HA Pereira (supra)* is a case which is almost on all fours with our present appeal. Mudie J referred to the judgment in *Montgomery & Co v. De Blumes* [1898] 2 QB 420 where he said that:

> The ground of the judgment in *Montgomery & Co v. De Blumes* is that the judgment was modified by the order for payment by instalments. Chitty L.J. in the course of his judgment says:
>
> > It seems to me that so long as the County Court Judge's order stands here there is a modification of the order of the High Court; and it would involve a great injustice to a defendant if it were not so. The defendant is told that he is to pay by instalments, and the instalments in such a case is generally small ... A man in such a position exerts himself in order to get the money together for the purpose of complying with the order. He does so under stress of a liability to imprisonment if he makes default, but I think he would likely to be misled, and it would put him in a hard position if he were told that he was still liable, in spite of that, to pay the whole debt, and that what goods he had could be taken in execution.
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> In my view the same principle is applicable to a Bankruptcy Notice. The judgment is modified by the order for payment by instalments, and it seems to me that the Bankruptcy Notice, which is founded on the judgment as it originally stood, thereby invalidated.

Learned counsel for the JD also referred to us, the judgment of Gun Chit Tuan CSJ in the Supreme Court of *Datuk Mohd Sari Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 4 CLJ 1798; [1992] 1 CLJ (Rep) 68; [1992] 2 MLJ 344 which had made reference to *Re HA Pereira (supra)*. Learned counsel for the JD concluded that the facts in our present appeal are more cogent than *Re HA Pereira (supra)* and *Datuk Mohd Sari (supra)* because the bankruptcy proceedings were initiated after the JC had obtained the JDS order.

[18] Coming back to our present appeal, in compliance with the JDS order (read together with the JDS appeal order) at the material time when the BN was filed, the JD has made monthly instalment payments until 12 June 2015. The JD contended that at no time had the JD defaulted in making monthly instalments under the JDS order (read together with the JDS appeal order) as the JDS order does not specify when the JD is required to make payments of monthly instalments to the JC.

[19] Even if there is a default in the payment of any instalment under the JDS order (which was denied by the JD), the only remedy available for the JC, is to commence committal proceedings against the JD as the JDS order contains a default clause as to enforcement.

[20] The JDS order (read together with the JDS appeal order) is governed by s. 4(7) of the Debtors Act 1957 where the JD is subjected to committal proceedings in the event of default of the JDS order and the JDS appeal order. Section 4(7) of the same reads:

> If the judgment debtor makes default in payment according to any such order, a notice in the form prescribed by rules of court may be issued, on the request of the judgment creditor, calling upon judgment debtor to attend before the court at a time therein stated and show cause why he should not be committed to prison for such default.

It is explicit that if there is default in the payment of instalments, the only remedy is to commence committal proceedings as provided under s. 4(7) of the same.

[21] Therefore, it was contended that the JC is estopped from filing the BN against the JD because the JDS order and the JDS appeal order are still in force and there has not been any default on the part of the JD in making the monthly instalments.

[22] Further, it was contended that, the learned judge had erred when he concluded that the BN was valid when the BN reflects a sum which is allegedly excessive. The BN is void as the amount is inaccurate and excessive namely:

(i) On 31 March 2015 (ie, the date when the BN was filed) the JD had made payment of RM1,500 pursuant to the JDS order to JC's solicitors by a bank draft. This payment is not reflected at all in the BN.

(ii) The BN also demanded in excess RM54.53 which is the interest calculated at the rate of 5% from 11 August 2011 to 31 March 2015 on the costs of RM300, although the final judgment does not provide for the same.

Counsel for the JD referred to us the case of *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104, where the final judgment made no mention of penalty interest or stamp duty but the BN had included the same. It was held by this court that a bankruptcy notice that requires a debtor to pay a judgment debt that is otherwise in accordance with the terms of the judgment is null and void *ab initio*.

[23] Similarly, in our present appeal, the claim is not what was awarded by the final judgment. The final judgment makes no mention of an interest rate of 5% on the costs of RM300, nonetheless the BN had included a claim for the same starting from 11 August 2011 until 31 March 2015. This, according to the JD, is clearly contravening the Bankruptcy Act 1967 which mandates that the demand made in the BN must be in accordance with the terms of the judgment or order.

[24] Hence, the JD contended that the above defects in the BN are not mere irregularities which could be cured and strict compliance of the procedures must be adhered to. Following thereto, the JD concluded that, any defects ought to be decided in favour of the JD.

Findings

Whether The JC Can Commence Bankruptcy Proceedings As The JDS Was Already In Place Against The JD

[25] The learned High Court Judge found that the JC can proceed to issue the BN for bankruptcy proceedings as under s. 3(1) of the Bankruptcy Act 1967, it provides that, a judgment creditor who has obtained a final order against a judgment debtor for any amount and execution thereon had not been stayed, was entitled to commence a bankruptcy proceeding against the judgment. He relied on a High Court case of *Re Chen Sing Chew; Ex parte: Oriental Tin Smelters Sdn Bhd* [1974] 1 LNS 131; [1974] 2 MLJ 69, where it was held that earlier orders directing payment by instalments did not invalidate the bankruptcy proceedings. In that case, despite there being an order of payment by instalments, a subsequent bankruptcy proceeding taken was held to be valid.

[26] We are of the view that the learned JC had not erred when he held as such, for the following reasons.

[27] Firstly, the JDS is no bar to proceedings in execution. The JDS order is made pursuant to the Debtors Act 1957. It is a law promulgated by Parliament to consolidate the laws in relation to debtors which are to be found in the Debtors Ordinance of the Straits Settlements and the Civil

Procedure Codes and Rules of Court and to ensure uniformity throughout the Federation. The JDS order was made pursuant to s. 4(1) and 4(6) of the Debtors Act 1957 which provides that:

> (1) Where the judgment of a court is for the recovery or payment of money … the party entitled to enforce it … may, subject to and in accordance with any rules of court, summon the judgment debtor, … to be orally examined before the court respecting the judgment debtor's ability to pay or satisfy the judgment debt …
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> …
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> (6) Upon such examination or non appearance … the court may order the judgment debtor to pay the judgment debt either:
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> (a) in one sum whether forthwith or within such period as the court may fix; or
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> (b) by such instalments payable at such times as the court may fix.

[28] Accordingly, the JDS order prescribes that the JD is required to pay monthly instalments of RM5,000 to the JC until full and final settlement of the judgment debt.

[29] Further s. 8 of the Debtors Act 1957 provides that:

> Subject to any rules of court, an order for the payment of instalments of a judgment debt under this Part (of which section 4 of the same Act falls under) shall not be a bar to proceedings in execution unless and except to the extent that the court shall so direct.

[30] Horne J had occasion to consider the effect of the predecessor to s. 8 of the Debtors Act 1957, ie, s. 6(2) of the Debtors Ordinance in the Singapore case of *Ahna Moona Muthuraman Chettiar v. KN Nair & Ors* [1938] 1 LNS 9; [1938] 1 MLJ 177 when he was comparing the effect of an instalment order made under the Debtors Ordinance and one made under O. 40 r. 30(3) Rules of the Supreme Court then. He was of the view that an order under O. 40 r. 30(3) Rules of the Supreme Court clearly falls within the proviso of O. 40 r. 16 of the same and there is no statutory procedure leaving other forms of execution open to the judgment creditor while the installment order is in force. Order 40 r. 16 provides that, "every person to whom a sum of money or any costs are payable, shall as soon as the money or costs are payable, be entitled to sue out one or more writ or writs of seizure and sale subject nevertheless as follows:

(a) If the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period;

(b) The court or judge may at any time after the time of giving judgment or making the order stay execution until such time as it or he thinks fit.

The right to sue out the writ depends upon something being payable under the judgment or order and if time is fixed for payment then by proviso (a) the writ cannot issue until the time expires." However, an instalment order under the Debtors Ordinance requires a statutory authority to keep other forms of execution alive. Horne J further acknowledged that:

> Section 6(2) of the Debtors Ordinance provides that an instalment order under Pt 1 of the Debtors Ordinance shall not be a bar to proceedings in execution ... .

[31] Similarly, the effect of s. 8 of the Debtors Act 1957 is that it is a statutory authority that keeps other forms of execution alive. Following thereto, an order to pay by instalments of a judgment debt does not prevent the execution of a judgment.

[32] The facts of the present case show that the JD had defaulted in his instalment payments which were in breach of the JDS order. In this respect:

(a) the monthly payment (RM1,500 for Sim Kok Beng (Appeal No. W-03(IM)(NCC)-21-2016) and RM5,000 for Azlin) which was due on 13 March 2015 was not paid until after the BN was filed on 31 March 2015 at 11.40am;

(b) the cheque for the monthly instalment was then received by the JD's solicitors on 31 March 2015 at 4.15pm but could only be cashed in on 1 April 2015.

[33] Bankruptcy proceedings are commenced and premised upon an act of bankruptcy committed by the debtor. Section 3(1)(i) of the Bankruptcy Act 1967 provides that:

> (i) If a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the federation ... a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice ... and he does not within seven days after service of the notice in case the service is effected in Malaysia either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained.

As far as our present appeal is concerned, the fact shows that:

(i) the JC has obtained final judgment against the JD;

(ii) there has been no stay of execution of the final judgment;

(iii) the JD has not complied with the BN within seven days of the service of the notice.

[34] In respect of the requirement of para. (a), ie, there was a final judgment, there is no dispute that there was one against the JD. What is perhaps an issue would be the requirement in para. (b), ie, whether JDS proceeding amounted to a stay of execution of the judgment. We are of the view that it is not.

[35] The very same issue as to whether a JDS constituted an implied stay of execution and hence prevented the issuance of a bankruptcy notice was duly considered in the New Zealand High Court case of *Re Sturdee (A Debtor)* [1985] 2 NZLR 627 which was referred to us by counsel for the JC. Although the decision therein was against the backdrop of the New Zealand Insolvency Act 1967, the principle which can be distilled therefrom is applicable to the present appeal as s. 19(1)(d) of the New Zealand Insolvency Act 1967 bears resemblance to s. 3(1)(i) of our Bankruptcy Act 1967. There, the judgment debtor argued that another mode of execution, which the judgment summons is, and which had been commenced and remained incomplete, constituted an implied stay. The court considered s. 19(1)(d) of the New Zealand Insolvency Act 1967 which permits the issuance of a bankruptcy notice if a creditor has obtained a final judgment upon which execution has not been stayed. It was held that:

> ... the issue of a judgment summons, without more, does not give rise to any implied stay. The mere presence of a judgment summons does not prevent the debtor from complying with a bankruptcy notice. Accordingly, I hold the debtor on this head of argument.

The court in *Re Sturdee (supra)* was of the view that there was no implied stay of execution by the mere presence of a judgment summons and held that the judgment debtor must comply with the bankruptcy notice.

[36] Coming back to the appeal that is before us, since execution is not prevented nor stayed with the issuance of the JDS order, then the JC has met the requirements for the committal of an act of bankruptcy under s. 3(1)(i) of the Bankruptcy Act 1967 namely, the judgment is a final one, the JD had failed to comply with the BN and more pertinently, the execution of the judgment has not stayed.

[37] Since the JD has committed an act of bankruptcy, therefore, it follows that the BN is valid and there are no merits in the application by the JD to set aside the BN.

[38] As s. 8 of the Debtors Act 1957 provides that an order for the payment of instalment payments shall not be a bar to proceedings in execution save and except to the extent that the court shall so direct, it is to be noted that, when the court granted the JDS order, there was no direction from the court as to the extent of any permissible execution proceedings pursuant to this said section, ie, there was no limitation nor conditions set out on execution in the JDS order.

Whether There Has Been A Modification Or Variation Of The Original Judgment

[39] Learned counsel for the JD submitted that, there has been a modification and a variation of the original judgment by the order of the JDS. It was contended that the BN cannot be founded on the original judgment but should be premised on the second varied order ie, the JDS order. The case of *Re HA Pereira Ex parte Pagor Singh (Bhagat Singh) (supra)* relied on by the JD concerned an application to set aside a bankruptcy notice on the ground that an order was subsequently made for payment of the judgment debt by instalments. Mudie J was of the view that the judgment was modified by the order for payment of instalments and therefore it followed that the bankruptcy notice which was founded on the judgment as it originally stood, was thereby invalidated. As a result, the bankruptcy notice was subsequently set aside. Later cases of *Ahna Lana Velathan v. Vina Chinniah & Anor* [1938] 1 LNS 8; [1939] MLJ 34 and *Kuna Sockalingam Mudaliar v. Yang Saripah & Anor* [1953] 1 LNS 39; [1954] MLJ 11 were also referred to us, to establish the fact that an order for the manner of payment in instalments amounts to a variation of the decree.

[40] Counsel for the JC referred to us, the rationale of Lord Esher in *Re Watson Ex parte Johnston* [1893] 1 QB 21 wherein he opined that the power of ordering the debtor to pay by instalment is not "execution" but are decrees or judgments themselves, which was followed subsequently in our local cases in *Ahna Lana Velathan v. Viva Chinniah and S Sithambaram* [1938] 1 LNS 8; [1939] 1 MLJ 34 and *Kuna Sockalingam Mudaliar v. Yang Saripah & Anor (supra)* where Wilson J said in his judgment that:

> It remains only to consider whether or not an order to satisfy a decree by paying in instalments is execution. In my opinion it is not and it is merely a variation of the decree which is, in effect, an order for a defendant to satisfy the amount of the decree with interest and costs by one lump sum payment forthwith. That order, in my opinion, cannot be regarded as execution of the decree nor do I think that a subsequent variation of that order for payment by instalments can be regarded as execution.

[41] We are of the view that those cases cited by the JD (*Re HA Pereira (supra)*, *Ahna Lana Velathan v. Viva Chinniah* and *S Sithambaram (supra)*, *Kuna Sockalingam Mudaliar v. Yang Saripah & Anor (supra)* were cited primarily for the proposition that such orders under a JDS are decrees or judgments in themselves and that these cases precede our current Debtors Act 1957.

The facts in the case of *Datuk Mohd Sari Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd (supra)* which was referred to us by counsel of the JD, was decided premised on facts which are different to the present appeal that is before us.

In *Datuk Mohd Sari Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd (supra)*, there was a consent judgment obtained against the appellant and subsequently the appellant offered to pay the said judgment by way of

monthly instalments. The offer was accepted by the respondent and the respondent issued receipts for seven instalments. There was no term nor condition stipulated to provide for eventuality of a default in any payment of any instalment. The appellant subsequently defaulted for the months of August to December 1989. This resulted in the respondent issuing a bankruptcy notice. The appellant applied to set aside the bankruptcy notice which was dismissed by the High Court. The appellant appealed to the Supreme Court where he contended that the respondent was estopped from issuing out the bankruptcy notice as there was already an agreement for settlement of the judgment sum by way of instalments payments and there was no default provision in the agreement between the appellant and the respondent. The Supreme Court allowed the appeal premised on the grounds that there was nothing in the agreement between the appellant and the respondent of any default provision in the payment of any instalment that in the event of any default, the judgment creditor was entitled to proceed to issue the bankruptcy notice in respect of the balance due on the judgment debt. It was also held that the terms of the consent judgment were controlled by an outside agreement between the judgment creditor and the judgment debtor and non-compliance with the judgment is not an act of bankruptcy. Further, the Supreme Court held that the demand for payment in the bankruptcy notice was not in accordance to the terms of the consent judgment as was required by s. 3(1)(i) of the Bankruptcy Act 1967. The demand for payment was regulated by the terms of the agreement between the parties and therefore the non-compliance with such notice could not constitute an act of bankruptcy on strict construction of the Bankruptcy Act 1967.

Clearly, *Datuk Mohd Sari Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd (supra)* can be distinguished from our present appeal on its facts. The facts in our present appeal does not concern a consent judgment and agreement between parties as was the case with *Datuk Mohd Sari Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd (supra).*

[42] On the issue, whether JDS is an execution proceeding, it is clear that, from the reading of s. 3 of the Debtors Act 1957, the same is an execution proceeding.

[43] Hence, the net result is that there is no modification or variation of the original judgment by virtue of the JDS order.

[44] Further, s. 8 of the Debtors Act 1957 provides that an order for the payment of instalments of a judgment debt shall not be a bar to proceedings in execution.

[45] On the presupposition that a bankruptcy proceeding is another mode of execution; the Federal court case of *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* [2015] 4 CLJ 561 held that the JC's right to issue a BN is pegged to its right to proceed with execution. As execution was not barred at the time when the BN was issued, then the right to issue the BN must be upheld.

[46] In addition, the JC is entitled to concurrently pursue all and any execution proceedings on the final judgment (Refer to *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77, *Moscow Narodny Bank Ltd v. Ngan Ching Wen* [2004] 2 CLJ 241; [2005] 3 MLJ 693).

[47] Therefore, based on the above authorities, the JC is entitled to commence bankruptcy proceedings against the JD concurrently with the JDS order.

Whether The JD Had Been In Breach Of The JDS Order

[48] It was the finding of the learned judge that the JD had defaulted in the monthly instalment that ought to have been paid to the JC, therefore the JD was in breach of the JDS order.

[49] From the evidence that was before the court, the JD had made payment after the BN was issued against the JD on 31 March 2015. The cheque for the instalment payment was received by the JC's solicitor on 31 March 2015 at 4.15pm after the BN was filed. The cheque could only be cashed in on 1 April 2015. Effectively, there had not been any payment made before the BN was filed. The Supreme Court in *Re Chen Sing Chew; Ex parte: Oriental Tin Smelters Sdn Bhd* [1974] 1 LNS 131; [1974] 2 MLJ 69 held that bankruptcy proceedings can be commenced where there was a default in the instalment payments which was in breach of an order to pay by instalments (ie, a JDS). The court had held that:

> ... I hold that the bankruptcy proceedings have not been rendered invalid by the orders for payment of the judgment-debt by instalments.

Whether The Original Judgment Was Nullified By The JDS Order

[50] It was submitted by the JD that the JDS order allows the JD to make payment of the judgment debt by monthly instalments and not one lump sum payment forthwith as was decreed by the original judgment. Therefore, the JD contends that he no longer needs to comply with the original judgment.

[51] However, we disagree with the submission by the JD. The original judgment has never been set aside nor overturned on appeal and thus it remains valid and enforceable. The JDS order which allows for instalment payments does not mean that it nullified the original judgment.

[52] As s. 8 of the Debtors Act 1957 provides that the JDS order is no bar to proceedings in execution, the JC is at liberty to commence bankruptcy proceedings although there is a JDS order. In the light of the JD's default in his payment under the terms of the JDS order, it is all the more reason for the JC to do so.

Whether The BN Is Valid In The Light Of The Different Amount Claimed

[53] The JD essentially claimed that the amount claimed in the BN was more excessive than the original judgment. As a result, the BN is invalid, null and void *ab initio*. The JD raised the issue that the BN:

(i) demanded in excess RM54.53 (which is the interest calculated at the rate of 5% from 11 August 2011 to 31 March 2015 on the costs of RM300, although the final judgment does not provide for the same);

(ii) does not include the maturity dates for the performance guarantees (PG) and financial guarantee (FG) banking facilities;

(iii) failed to reflect payment already made by the JD ie, on 31 March 2015 (ie, the date when the BN was filed) the JD had made payment of RM1,500 pursuant to the JDS order to JC's solicitors by a bank draft. This payment is not reflected at all in the BN.

[54] On the interest issue, we agree with the learned judge that interest on costs is claimable from the date of judgment pursuant to O. 42 r. 12 of the Rules of Court 2012.

[55] Counsel for the JD contended that the BN is vague and confusing as the JC failed to state the maturity dates of the PG facility and the FG facility. We found that the learned judge had not erred in this respect. The judgment clearly states the amount payable for the PG facility which is RM5,300,000 as at 28 February 2011 and interest chargeable on the sum thereon shall be at the rate of 3.5% above the JC's base lending rate calculated on monthly rests from 1 March 2011 until the date of full payment. As for the FG facility, the judgment provides for the interest rate of 3.5% above the JC's base lending rate calculated on monthly rests from 31 March 2009 (ie, the maturity date of FG facility) until the date of full payment.

[56] Further, the BN and the statement of accounts (which was attached to the BN) reflected the computation of the outstanding amount due under both PG and FG facilities and showed that it is in accordance with the judgment.

[57] In any event, a BN shall not be invalidated by the fact that the sum specified in the notice as the amount due, exceeds the amount actually due, unless the JD had given notice to the JC that he disputed the validity of the notice on ground of such mistake (refer to s. 3(2) of the Bankruptcy Act 1967).

[58] Essentially, the JD is challenging the amount specified in the BN, hence a notice as stipulated under s. 3(2) of the Bankruptcy Act 1967 is required, which the JD failed to issue, which was one of the preliminary points raised by the JC.

[59] On the contention by the JD that the claim in the BN is excessive as it failed to take into account the payment already made by the JD on 31 March 2015, it is the finding of the learned judge that the JD only paid the monthly payment which was due on 13 March 2015 to the JC after the issuance of the BN.

[60] The learned judge had correctly stated in his judgment that the acceptance of payment by the JC does not nullify the BN as the outstanding amount due is over and above the statutory limit as provided under s. 5(1) of the Bankruptcy Act 1967. The decision of the Federal Court in *Moscow Narodny Bank Ltd v. Ngan Chin Wen* [2004] 2 CLJ 241; [2005] 3 MLJ 693 held that even if the amount claimed in the BN is excessive, the bankruptcy proceedings are not invalidated so long as the amount exceeds the statutory minimum sum of RM30,000 under s. 5(1)(a) of the Bankruptcy Act 1967.

Hence, the BN is not invalidated even if it failed to take into account the part payment, as long as the balance sum claimed is above the statutory limit set by the Bankruptcy Act 1967, as in the present appeal that is before us. It is to be noted that the judgment sum is RM80 million and the payment received is RM5,000, leaving a balance far above the RM30,000 statutory limit.

Conclusion

[61] Therefore, the bankruptcy jurisdiction under s. 3(1)(i) of the Bankruptcy Act 1967 is validly invoked.

[62] We therefore dismissed the three appeals with costs of RM15,000 for the three appeals subject to allocator and deposit refunded.